Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MADISON MATERIALS COMPANY INC., PETITIONER

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Madison Materials Company, Inc. contracted with Respondent St. Paul Fire & Marine Insurance Company for commercial crime coverage. This case involves the interpretation of the breadth of coverage of the policies in question.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court and held that related acts of embezzlement occurring across multiple fidelity policy periods constitute one occurrence of employee dishonesty, thereby permitting recovery up to the Limit of Insurance for the policy in effect at the time the theft was discovered. Recovery was limited to a single, one-year policy, notwithstanding,

> (a) the existence of successive one-year policies in place for the duration of the theft (eleven years), each covering loss for an embezzlement act or series of related acts committed within its respective policy period, and
>
> (b) the timely discovery of loss under each of the policies as dictated by Mississippi common law, thereby activating each for recovery for acts committed within its respective policy period.

Two questions are presented:

1. Whether the plain meaning of occurrence, a term present in each successive policy, was correctly understood by the Fifth Circuit to include related embezzlement acts that occurred during the duration of other policies, despite express policy language to the

contrary and the opposite authority in other federal circuits?

2. Whether the Fifth Circuit failed to respect state law by arbitrarily selecting a single policy for consideration of loss coverage for related acts crossing multiple policy periods in contravention of precedent that the entire series in a succession are activated for recovery, each covering acts within its respective policy period?

RULE 29.6

Madison Materials Company, Inc. is a corporation organized under the laws of the State of Mississippi. It has no parent corporation. No publicly held company has any ownership interest in the corporation.

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The opinion of the U.S. Court of Appeals for the Fifth Circuit, dated April 2, 2008, is officially reported at *Madison Materials Company, Inc. v. St. Paul Fire and Marine Insurance Company*, 523 F.3d 541 (5th Cir. 2008), and is reproduced at App. A. The 5th Circuit denied a Petition for Rehearing on May 15, 2008 in an unreported decision, and is reproduced at App. C.

The Memorandum Opinion and Order of the U.S. District Court for the Southern District of Mississippi, Jackson Division, dated September 27, 2006 in an unreported decision, and is reproduced at App. B.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on April 2, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the date of the denial of a petition for rehearing by Petitioner. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED (none)

STATEMENT

1. Petitioner, Madison Materials Company, Inc. is incorporated in the State of Mississippi and for more than thirty-seven years had been engaged in the business of the prefabrication of concrete expanses. An embezzlement scheme, orchestrated by an insider, cost Petitioner over $1.5 million in employee theft loss from January 26, 1992 to January 26, 2003, a span of eleven years. Employee theft acts occurred in each of the eleven years.

Petitioner contracted with Respondent St. Paul Fire & Marine Insurance Company and its predecessor-in-interest for insurance covering commercial crime. A series of successive fidelity contracts covered uninterrupted the eleven years of embezzlement loss. The record reflects that each policy was for a one year period, though, that issue was the subject of some dispute. It appears, though, that the Fifth Circuit understood the series of fidelity policies to be periodic and therefore independent, not considered one continual contract, which is consistent with the Mississippi Supreme Court's understanding in cases similarly situated.

Petitioner filed a Proof of Loss, condition precedent to coverage, with Respondent, showing loss that occurred every year of the eleven in question. Payment for loss was tendered under a single policy, the one in effect at the time of discovery of loss, up to the Limit of Insurance of $350,000. Loss incurred under the other relevant policies was denied coverage.

Petitioner understood the plain meaning of the policies and the state of the substantive law of the State of Mississippi to lead to one reasoned coverage conclusion - each policy covers loss in its respective policy period for acts committed within the period, up to the limit of insurance, as long as discovered in a timely fashion. This position is grounded in the contract provisions:

First, the general conditions section of each policy contains a Discovery Clause indicating the time frame in which loss must be identified in order to sustain recovery of covered loss:

> "Discovery Period of Loss (Extended Period To Discover Loss): We will pay only for covered loss discovered no later than one year from the end of the policy period."

Second, an Extension of Coverage provision provides an addendum to the discovery clause:

> "Loss Sustained During Prior Insurance:
>
> a. If you, or any predecessor in interest, sustained loss during the period of any prior insurance that you or the predecessor in interest could have recovered under that insurance except that the time within which to discover loss had expired, we will pay for it under this insurance, provided:
>
> (1) This insurance became effective at the time of the cancellation or termination of the prior insurance; and

(2) The loss would have been covered by this insurance had it been in effect when the acts or events causing the loss were committed or occurred."

b. The Insurance under this Condition is part of, not in addition to, the Limits of Insurance applying to this Insurance and is limited to the lesser of the amount recoverable under:

(1) This insurance as of its effective date; or

(2) The prior insurance had it remained in effect.

Third, the following definitions further frame the conditions in order to recover for loss attributed to employee dishonesty:

- **Policy Period Provision-** "Subject to the Loss Sustained During Prior Insurance Condition, *we will pay only for loss that you sustain through acts committed or events occurring during the Policy Period (as defined in Crime General Provisions—Policy Period).*"

- **Coverage Provision-** "[w]e will pay for loss..... resulting directly from the Covered Cause of Loss—Employee Dishonesty."

- **Limit of Insurance Provision** - "the most [w]e will pay for loss in any one "occurrence," is the applicable Limit of Insurance shown in the Declarations."

- **Occurrence** in policies one through eight "means all loss caused by, or involving, one or more "employees," whether the result of a single act or series of related acts."

- **Occurrence** in policies nine through eleven "means an act or series of related acts involving one or more [e]mployees."

2. The crux of Petitioner's claim is simple - loss is recoverable under each successive contract for acts committed within the respective policy period. Each policy is a separate contract. The policy language for each is the same except for a slight modification to occurrence for the final three policies. Hence, the interpretation of each policy will be identical.

Each contract is bound by a temporal limitation, the policy period. A recoverable loss determination is effectuated by grouping related acts of the period into an occurrence and then applying the Limit of Insurance. That computation is made for each policy and its respective period. Occurrence is necessarily understood within the context of a period as evidenced by the definition above.

3. Petitioner filed its Complaint in the Mississippi State Circuit Court in Copiah County on or about November 25, 2003. Respondent filed an Answer and Notice for Removal to Federal Court, thereafter ordered by the United States District Court, Southern District, Jackson Division. Summary Judgment in favor of Respondent was rendered on September 27, 2006. The district court determined that occurrence gathered related acts outside of the policy period into

one occurrence spanning multiple periods, effectively limiting recovery to a single arbitrarily selected policy, in this case, the policy in place at the time of discovery of loss.

4. The Fifth Circuit's decision was entered on April 2, 2008. It affirmed the decision of the lower court resting its decision on its interpretation of occurrence, holding that the term does include acts committed outside of the policy period. The court also expressly holds that, despite language forbidding so, loss from acts committed outside the policy period is recoverable under the policy in place at the time of discovery. Petitioner contends that the court refused to apply the plain meaning of the words of the contract within the context of the policy period provision, wrote out of the policy the limitation for recovery of acts committed outside of the policy period, and ignored the existence and viability of an entire series of successive contracts with the same implicated provisions used to calculate recoverable loss (i.e. occurrence is the same in year one policy as it is in year eight policy).

5. A Motion for Re-Hearing was denied on May 15, 2008.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decisions of the United States Court of Appeals for the Ninth Circuit and the Fourth Circuit. When confronted with the task of interpreting the plain meaning of insurance policy provisions identical to those that faced the Fifth Circuit, both the Ninth, in a published

decision, and the Fourth, in an unpublished decision, came to conclusions directly opposite.

The insurance industry, as a result of its participation in industry associations, promulgates standard forms for dissemination throughout the country, thereby hoping for continuity of application. That goal has proved to be illusory in that state appellate and supreme courts throughout the country have formed two camps concerning the plain meaning of the coverage provisions referenced above. Federal courts have followed suit.

Upon examination of the decisions throughout the country, one conclusion is apparent. There is controversy regarding the understanding of the words of a widely used contract. There is but one judicial body remaining to examine and apply reasoned analysis such to remedy the inconsistency of application of policies similarly situated. And, there is only one opportunity remaining to right a wrong and correct the legal analysis offered by the Fifth Circuit.

The Fifth Circuit extended the reach of occurrence into other periods, despite express language to the contrary. Its decision misapplied basic construction principles, misread the contracts, rewrote provisions, displayed a misunderstanding of the relevant issues and wrote an opinion lacking a clear analysis. The field of law is eminently more complicated in light of its decision that conflicts with other federal circuits. That conflict now requires resolution in order to clarify the field, eliminate unnecessary and costly litigation, and to reach the reasonable expectation of the consumer. It's David v.

Goliath, though instead of a stone, the Petitioner has the Court.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF RELEVANT COVERAGE PROVISIONS IN COMMERCIAL CRIME POLICIES.

The state of the common law regarding the interpretation of the coverage provisions implicated in commercial crime policies is in disarray. Courts examining the same provisions, within the framework of the exact fact pattern that confronted the Petitioner and Respondent, come to two different conclusions. The understanding and application of the exact policies differs from jurisdiction to jurisdiction. This has obviously now implicated the federal courts. The Fifth Circuit's conclusions conflict in all respects with the holdings of the Ninth and Fourth Circuit.

The complete line-up of courts all have been confronted with the same questions grounded in the same set of facts. An insured purchases a commercial crime policy for a one-year period. At the end of the period, a new policy is issued, pursuant to the payment of an agreed premium. Payment of the premium insures uninterrupted theft coverage. Purchase of the term specific policies continues period to period. Each policy period in the line of succession had identical coverage regarding "employee dishonesty." At some point in the line of successive contracts, embezzlement is discovered to have spanned multiple policy periods. The insured expects each policy to cover acts committed within its respective policy period. The

insurer indicates it will cover acts only under the policy in place at the time of discovery of the loss. And thus controversy ensues.

The Fifth Circuit was the third of the circuits to weigh in on the questions presented. When it rendered its decision in this case, the Fifth Circuit had the benefit of, but disregarded, the prior decisions of the Ninth and Fourth Circuit, each ruling directly on the exact issues before the Fifth.

A. REVIEW IS NECESSARY TO RESOLVE THE FIFTH AND NINTH CIRCUIT CONFLICT.

Interpretation of the term occurrence proved to be the flash point for the Ninth Circuit. In *Karen Kane v. Reliance Surety Company*, 202 F.3d 1180 (9th Cir. 2000), finding *A.B.S. Clothing Collection, Inc. v. Home Insurance Co.*, 34 Cal. App. 4th 1470 (Cal. Ct. App. 1995) to be a persuasive statement of California law, the court, in answering the question whether an insurer for acts of employee dishonesty can properly refuse to pay up to the coverage limit for the first two of three separate one-year policy periods (it paid under year three), in connection with an employee's fraudulent scheme that spanned all three periods, held that occurrence is necessarily limited by the policy period. The court found an ongoing fraudulent scheme would be recoverable as a separate occurrence within each policy period, consistent with considering each contract independently.

In *Karen Kane*, the commercial crime policy defined occurrence as "*all loss* caused by, or involving, one or more employees, whether the result of a single

act or series of acts" (the same as that for policies one through eight in the case herein) and placed temporal limitations upon loss coverage ("we will pay only for loss that you sustain through acts committed or events occurring during the policy period"). The limitation clause stated "the most [Reliance] will pay for loss in *any one* occurrence is the applicable Limit of Insurance shown in the Declarations." *Id.* at 1184-85. Each provision mirrors those implicated herein.

The court found that the provisions created an ambiguity as to the extent of the insurer's liability, because while defining occurrence as "all loss" suggests that there can be only one occurrence during the life of the insurance, the provision restricting liability "for any one occurrence" suggests there could be more than one occurrence. See *Karen Kane*, 202 F.3d at 1187. Furthermore, the provision limiting recovery to the policy period placed a definite temporal limitation on occurrence.

The court concluded occurrence is an ambiguous term with respect to temporal limitation and held in favor of the insured. Occurrence was interpreted to include acts or series of acts within a policy period and not across multiple periods. The court held that "an insurer which issues three separate policies for employee dishonesty is liable up to its limit of liability for each policy period." *Id.* at 1188.

The Fifth Circuit completely ignored the analysis of the Ninth Circuit, where the same fact pattern and policy provisions were thoroughly examined. The substantive law of Mississippi and California, regarding ambiguity resolution and contract

construction, is similar - the insured prevails where ambiguity exists. The fact pattern was the same. Identical provisions were considered. Yet, the Fifth Circuit chose to ignore the reasoned analysis in the Ninth Circuit and expound occurrence to include events occurring inside the boundary of separate, independent policies containing the same definition of occurrence. In doing so, it ignored the impact of the express policy period provision that placed a temporal limitation on occurrence and limited recovery to a single, arbitrarily chosen policy, the one in place at the time of discovery. See *Madison Materials v. St. Paul Fire & Marine Ins.*, 523 F.3d 541, 543-545 (Fed. 5th Cir. 2008).

B. REVIEW IS NECESSARY TO RESOLVE WHAT PORTENDS TO BE A FIFTH AND FOURTH CIRCUIT CONFLICT.

Further, the Fifth Circuit opinion chose to ignore the insight gained from the analysis by the Fourth Circuit on the same questions. In an unpublished decision, which by local rule is not binding precedent in that particular circuit, the Fourth Circuit agreed with the Ninth Circuit's conclusions.

Reviewing the decision of the district court in *Spartan Iron & Metal Corp. v. Liberty Insurance Corp.*, 99-CV-2575 (D.S.C. April 25, 2000), citing *Penalosa Coop. Exch. V. Farmland Mut. Ins. Co.*, 789 P.2d 1196, 1200 (Kan. Ct. App. 1990), where it was held that "this provision (policy period provision) has the effect of severing the series of acts constituting an occurrence at the termination date of a policy, thereby permitting recovery under successive policies as the acts of employee misconduct continued," the Fourth

Circuit agreed that the period language supports the conclusion that the policies "were intended as successive and independent one-year contracts for coverage, and thus that the policy terms, including the definition of occurrence, should be construed accordingly to allow recovery under each of the policies issued...." *Spartan Iron & Metal Corp. v. Liberty Insurance Corp.*, 6 Fed.Appx 176, 178 (4th Cir. 2001) (unpublished).

Even the United States District Court, D. Maryland, Northern Division in *Bert M. Glaser, M.D., P.A. v. Hartford Casualty Insurance Company*, 364 F.Supp.2d 529 (D.Md. 2005) found the analysis in *Spartan Iron* to be particularly persuasive in interpreting occurrence.

The court followed *Spartan Iron* and held that occurrence is limited by the temporal limitations of the policy period such that acts of embezzlement crossing multiple policy periods constitute one occurrence in each policy year. See *Bert M. Glazer, M.D., P.A.* at 537. The result is each successive policy is active for recovery for acts committed during its respective period.

II. REVIEW IS NECESSARY TO CORRECT THE PROMULGATION OF A LINE OF REASONING INCOMPATIBLE WITH THE WORDS EXAMINED.

The Fifth Circuit rested its decision on the meaning of occurrence. It found that the words included acts committed outside of a policy period. In fact and remarkably, it held, despite the express

limitation of the Policy Period Provision ("we will pay only for loss that you sustain from *acts* ***committed or events occurring during the Policy Period***") that "the only way that Madison could recover for losses incurred in a prior policy period would be if the losses incurred in the current policy period total less than the current policy's limit, and then only to the extent required to bring the insured's recovery up to the current policy's loss limit, here $350,000." *Madison Materials* at 545, 546.

The Fifth Circuit appears to recognize that the policies were separate contracts, however does not conduct its interpretation with that fact in mind. The Fourth Circuit made the observation that the varied jurisprudence appears to be a result of the application of two distinct approaches to resolving the issues. One group of cases grounds its analysis in its version of contract interpretation and the other focuses its sights on the question of whether the contracts are considered successive and independent or the parties intended coverage through one continuous contract. *Spartan Iron* at 178, 179. The Fifth Circuit's implied concession that the policies are distinct and independent would seem to justify the approach of the other Circuits, whereby interpretation of the term occurrence recognizes that the term has significance in each policy, not simply the one in place at the time of discovery.

The Mississippi rule of law acknowledging the independence of each in a series of successive contracts has its genesis in *Universal Underwriters Insurance Company v. Buddy Jones Ford*, 734 So.2d 173 (Miss. 1999). There, the Mississippi Supreme Court resolved the ambiguity created by the presence of a one-year

discovery provision and an extension provision without a time limitation by asserting that each policy's discovery clause was continuously imported into successive policies. *Id.* at 179. The result is that if loss is discovered within one year of the final policy in succession, then loss that occurred in prior periods is recoverable under the respective policy in place at the time of the acts. That is the seminal point of the ruling.

Unfaithful to its duty to apply the substantive law of the State of Mississippi, the Fifth Circuit never considered the viability of the series of successive contracts and their impact on the analysis. The court did not address the fact that loss was timely discovered pursuant to the holding of *Buddy Jones* such to activate each individual contract for consideration of recovery.

The Fifth Circuit's laser focus on occurrence seems to have caused it to misjudge the import of the State of Mississippi law regarding the series of successive contracts. Despite protestations otherwise by the Fifth Circuit, *Buddy Jones* has no precedential value in consideration of the occurrence matter herein. In *Buddy Jones*, the recovery limitation clause applied to each fraudulent act. No language was present to group related acts into an occurrence for the purpose of applying the limitation clause. However, in addressing the arguments of the insurer, the Mississippi Supreme Court commented on those situations where multiple acts may constitute one occurrence of loss. The *Buddy Jones* court simply commented that where policy language clearly states multiple acts may constitute one occurrence of loss, those acts are grouped by the cause of resulting injury. It did not analyze if occurrence includes acts committed during periods covered by

other successive contracts. It did not analyze the significance of the same definition of occurrence in multiple successive policies. The court absolutely had no occasion to extend its analysis of occurrence to determine if it was period specific because the words were never present in the series of policies in *Buddy Jones.*

Finally, the Fifth Circuit offers a fallback position in the event occurrence does not mean what it says it does. The applicable provision is entitled "Loss Covered Under This Insurance and Prior Insurance Coverage Issued by Us or Any Affiliate:"

> "If any loss is covered:
> a. Partly by this insurance; and
> b. Partly by any prior cancelled or terminated insurance that we or any affiliate .....; the most we will pay is the larger recoverable under this insurance or the prior insurance."
> Regardless of the number of years this insurance remains in force, or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period.

The Fifth Circuit again misapplies the plain meaning analysis. The above-referenced provision is inapplicable to the analysis herein, in that considering the facts of this case and like the others litigated throughout the country, any loss by definition is period specific and recoverable solely under the policy in place during the respective loss. Loss in a period cannot be covered partly by one in a series and partly by another, by the plain meaning of the policy period provision. The successive policies at issue herein are not those

contemplated above. Further, every successive policy has the same language, which necessarily results in a Limit of Insurance for each respective period.

The Fifth Circuit opinion is irreconcilable with the other circuits' conclusions. While the matters have been the subject of dispute for many years, as duly noted by the Fourth Circuit in *Spartan Iron*, where it was pointed out that the extent of an insurer's liability for losses spanning several years or successive policies has been the subject of a long and varied jurisprudence, it now seems as if a great opportunity exists to clarify an area of the law that is susceptible to obfuscation and confusion of the issues. The incompatibility of the circuit decisions and the fact that the Fifth Circuit decision appears to stray far enough from reason justifies an intervention.

CONCLUSION

The exercise of the Court's judicial discretion will lend necessary guidance to the law in this area, help to render consistency of application, give guidance to courts in the application of a reasoned approach and protect the reasonable expectations of the consumer. The matters in dispute can be easily resolved and the guidance of the Supreme Court is necessary not only to render a just result, but to correct such an inordinate misallocation of societal resources to an issue that has commanded the attention of the state and federal court system for years on end.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 06-60991
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MADISON MATERIALS COMPANY INC,
Plaintiff - Appellant

v.

ST PAUL FIRE & MARINE INSURANCE COMPANY,
Defendant - Appellee

COUNSEL: For MADISON MATERIALS COMPANY INC., Plaintiff-Appellant: John Russell DeVoss, Jeffrey Jerome Smith, Smith & DeVoss, Hurst, TX.

For ST PAUL FIRE & MARINE INSURANCE CO, Defendant-Appellee: James K. Peden, III, Toni Scott Reed, Strasburger & Price, Dallas, TX.

JUDGES: Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

OPINION

WIENER, Circuit Judge.

Plaintiff-Appellant Madison Materials Company, Inc. ("Madison") appeals the district court's grant of summary judgment in favor of its insurer, St. Paul Fire & Marine Insurance Company ("St. Paul"). Concluding

that the losses suffered by Madison over a period of ten years constitute a single occurrence, we affirm.

I. FACTS AND PROCEEDINGS

St. Paul and its predecessor, United States Fidelity and Guaranty Company ("USF&G"), issued an unbroken series of insurance contracts that together span the ten year period from January 26, 1992 to January 26, 2003. The policies protected Madison from employee theft. In January 2003, Madison discovered that its financial officer, Vollie Neal Walker ("Walker"), had embezzled money from the company in each of the preceding ten years. Walker's scheme worked two ways: First, he opened fraudulent checking accounts in the names of two of Madison's suppliers and wrote checks from Madison that were deposited into the false accounts. Second, Walker began a payroll tax scheme in 2002 which resulted in his individual tax liability being paid by Madison. With the exception of $ 26,000 stolen through the payroll tax scheme, all of Walker's embezzlement was committed using the fraudulent checking accounts, which totaled $ 1,469,148.53.

Immediately after it learned of Walker's embezzlement, Madison notified St. Paul of the employee theft and submitted a sworn proof of loss for $ 1,469,148.53. St. Paul acknowledged receipt of the proof of loss and conducted an independent investigation into the theft, confirming Walker's embezzlement activities between 1992 and 2002. St. Paul concluded, however, that the most it owed Madison was $ 350,000, the limit of the insurance policy then in effect. St. Paul tendered that sum to Madison.

In November 2003, Madison sued St. Paul in Mississippi state court to recover the full amount of its loss. St. Paul removed the suit to the United States District Court for the Southern District of Mississippi. Subsequently, both parties filed motions for summary judgment. The district court ruled that Walker's embezzlement constituted a single "occurrence" and granted summary judgment in favor of St. Paul.

On appeal, Madison contends that Walker's myriad acts of theft over almost a decade constitutes more than a single occurrence because the scheme spanned multiple policy periods. We disagree. Our reading of the plain language of the policies convinces us that there was only one occurrence of employee dishonesty. We are not persuaded by Madison's argument that the language of the policy is ambiguous or that Madison is entitled to recover in excess of the limit of the policy that was in effect at the time the loss was discovered.

II. ANALYSIS

1. Standard of Review

We review a district court's grant of summary judgment *de novo*, applying the same standards as the district court.[1] Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2]

2. Applicable Law

In a diversity case such as this, the substantive law of the forum state, here Mississippi, controls.[3] Because

this appeal involves an insurance contract between a nonresident and a resident of the forum state, we must look to Mississippi choice of law rules to determine the applicable law in this case. As the contract was issued in Mississippi, we apply Mississippi law.[4]

3. Analysis

Under Mississippi law, construction of an insurance policy presents a question of law.[5] "[I]f an insurance contract is plain and unambiguous, it should be construed as written."[6] However, "ambiguous terms in an insurance contract are to be construed most strongly against the preparer, the insurance company."[7] The language of an insurance policy is ambiguous if "a reasonable person could have understood the terms to have more than one reasonable meaning."[8]

The dispute in this case turns on the meaning of "occurrence." Madison argues that the definition in the policy is ambiguous because it can be reasonably interpreted to exclude acts occurring outside of the policy period. According to Madison, this ambiguity entitles it to recover up to the policy limit for each of the ten successive policies issued by St. Paul or USF&G, given that some acts of embezzlement occurred and caused loss to Madison during the term of each policy. Again we perceive no ambiguity and reject Madison's proferred interpretation as unreasonable.

To determine St. Paul's liability under the contract, we start by interpreting the language of the policy itself. The policy in effect at the time that the loss was discovered states that "the most we will pay for loss in any one 'occurrence' is the applicable Limit of

Insurance shown in the DECLARATIONS." Therefore, if Walker's prolonged embezzlement constitutes a single occurrence, the most that Madison may recover from St. Paul is one policy's limit, or $ 350,000. The policy defines occurrence as "an act or *series of related acts* involving one or more 'employees.'"[9] Mississippi courts have recognized that an "occurrence" is determined by the cause or causes of the resulting injury.[10] Walker repeatedly committed related acts of embezzlement throughout the decade of St. Paul's and USF&G's coverage, but there was only one *cause* of the injury sustained by Madison -- Walker's dishonesty. As there was but a single cause of Madison's injury, and as the policy states that multiple related acts are to be treated as a single occurrence, there was only one occurrence of employee dishonesty over the ten year period.

Madison does not dispute that Walker's multiple acts of embezzlement during a single policy period constitute a single occurrence; however, Madison insists that there was a single occurrence of employee dishonesty *in each* policy period. Madison mistakenly relies on *Universal Underwriters Insurance Co. v. Ford* to support its argument that recovery is proper under each successive insurance policy. In *Ford*, an employee had embezzled money from a company on 175 different occasions over a four-year period.[11] The company was insured by Universal Underwriters, which had issued four consecutive one-year policies.[12] Each policy stated that Universal would cover "LOSS . . . resulting directly from any fraudulent or dishonest act committed by an EMPLOYEE."[13] The most that Universal would pay for employee dishonesty was $ 10,000 "as applicable to a LOSS caused by one or more

EMPLOYEES, or to all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated."[14] Finding no language in the policy to indicate "that multiple acts or a series of related acts may be treated as one occurrence of loss,"[15] the Mississippi Supreme Court held that each occasion of embezzlement was a separate loss subject to the $ 10,000 policy limit.[16]

The St. Paul policy contains key language not present in *Ford*. It specifically states that multiple related acts may constitute a single occurrence. As the court noted in *Ford*, the insurer is only liable for one occurrence when policy language "clearly and unambiguously states that multiple acts may constitute [a single] occurrence of loss."[17] As the St. Paul policy unambiguously includes multiple related acts in the definition of a single occurrence, the holding in *Ford* does not control the outcome of this case.

Even though the definition of occurrence in the St. Paul policy expressly contemplates multiple acts constituting a single occurrence, Madison urges that the wording is nonetheless ambiguous because it fails to state expressly that an occurrence may span multiple policy periods. We disagree. Policy language is ambiguous only if it can be *reasonably* interpreted in more than one way.[18] As Walker's embezzlement scheme consisted of a "series of related acts involving one or more 'employees,'" it undisputably meets the policy definition of occurrence. Nowhere does policy language state or even imply that acts committed outside of the policy period in question cannot be part of a "related acts" occurrence within that policy period. We recognize that other circuits have found similar

definitions of "occurrence" to be ambiguous,[19] but we are not persuaded that under Mississippi law, the definition of occurrence in this policy is ambiguous.

Madison further argues that even if the definition of occurrence is not facially ambiguous, it becomes ambiguous when read in context with other provisions in the policy. Specifically, Madison contends that the language providing for recovery "only for loss you sustain through acts committed or events occurring during the policy period" indicates that an occurrence cannot span multiple policy periods. Madison misinterprets the effect of the clause in question: It only works to exclude coverage for losses occurring while St. Paul is not the insurer; it does not enlarge St. Paul's liability for a single occurrence.

Even if we were to assume *arguendo* that, as Madison suggests, there was some ambiguity surrounding the definition of occurrence, other language in the policy makes clear that Madison may recover only once for an occurrence even if the occurrence spans several policy periods. The section entitled "Loss Covered Under This Insurance and Prior Insurance Coverage Issued by Us or Any Affiliate" states that

> If any loss is covered:
>
> > a. Partly by this insurance; and
> > b. Partly by any prior cancelled or terminated insurance that we or any affiliate had issued to you or any predecessor in interest; the most we will pay is the larger of the amount

> recoverable under this insurance or the prior insurance.
>
> Regardless of the number of years this insurance remains in force, or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period.

Additionally, the section entitled "Loss Sustained During Prior Insurance" provides that

> a. If you, or any predecessor in interest, sustained loss during the period of any prior insurance that you or any predecessor in interest could have recovered under that insurance except that the time within which to discover loss had expired, we will pay for it under this insurance.
>
> . .
>
> . . .
>
> b. The insurance under this Condition is part of, not in addition to, the Limits of Insurance applying to this insurance and is limited to the lesser of the amount recoverable under:
>
> > (1) This insurance as of its effective date; or
> >
> > (2) The prior insurance had it remained in effect.Under these provisions, St. Paul is only liable for one policy's limit if a single occurrence spans multiple policy periods or is covered by a prior insurance policy.[20] The only way that Madison could recover for losses incurred in a prior policy period

would be if the losses incurred in the current policy period totaled less than the current policy's limit, and then only to the extent required to bring the insured's recovery up to the current policy's loss limit, here $ 350,000.

III. CONCLUSION

We hold that all of Walker's related acts of embezzlement constituted only one occurrence of employee dishonesty. Under the terms of the policy, Madison is entitled to recover no more than the $ 350,000 limit of the policy that was in effect when the theft was discovered. The judgment of the district court is AFFIRMED.

Footnotes

[1]*Dallas County Hosp. Dist. v. Assocs. Health & Welfare Plan*, 293 F.3d 282, 285 (5th Cir. 2002).

[2]*United States v. Corpus*, 491 F.3d 205, 209 (5th Cir. 2007).

[3]*See Erie R.R. Co. v Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[4]*See Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003); *Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 400 n.1 (5th Cir. 1982).

[5]*Farmland Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 717 (Miss. 2004).

[6]*Id.*

[7]*U.S. Fid. & Guar. v. Omnibank*, 812 So. 2d 196, 198 (Miss. 2002).

[8]*Scruggs*, 886 So. 2d at 718.

[9]Emphasis added.

[10]*Universal Underwriters Ins. Co. v. Ford*, 734 So. 2d 173, 177 (Miss. 1999).

[11]*Id.* at 174.

[12]*Id.* A fifth insurance policy was issued by Underwriters after Ford discovered the loss.

[13]*Id.*

[14]*Id.* at 174-75.

[15]*Id.* at 178 n.1.

[16]*Id.* at 178.

[17]*Id.* at 177 (citing *Bus. Interiors, Inc. v. Aetna Cas. & Sur. Co.*, 751 F.2d 361 (10th Cir. 1984); *Am. Commerce Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224 (Minn. 1996)).

[18]*Id.* at 176.

[19]*See Spartan Iron & Metal Corp. v. Liberty Ins. Corp.*, 6 F. App'x 176, 178 (4th Cir. 2001) (unpublished); *Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180, 1187-88

(9th Cir. 2000); *Glaser v. Hartford Cas. Ins. Co.*, 364 F. Supp. 2d 529, 538 (D. Md. 2005); *A.B.S. Clothing Collection, Inc. v. Home Ins. Co.*, 34 Cal. App. 4th 1470, 1484-85, 41 Cal. Rptr. 2d 166, 174 (Cal. Ct. App. 1995). *But see Bethany Christian Church v. Preferred Risk Mut. Ins. Co.*, 942 F. Supp. 330, 335-36 (S.D. Tex. 1996) (finding the definition of occurrence to be "clear and unambiguous").

[20]*See Wausau Bus. Ins. Co. v. U.S. Motels Mgmt. Inc.*, 341 F. Supp. 2d 1180, 1184-85 (D. Colo. 2004);*Diamond Transp. Sys. Inc. v. Travelers Indem. Co.*, 817 F. Supp. 710, 712 (N.D. Ill. 1993).

CIVIL ACTION NO. 3:04-cv-14WS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, JACKSON DIVISION

MADISON MATERIALS COMPANY, INC.,
PLAINTIFF

v.

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY,
DEFENDANT

September 27, 2006, Decided

COUNSEL: For Madison Materials Company, Inc., Plaintiff: Brad M. Williams, Grenfell, Sledge & Stevens, Jackson, MS. John R. DeVoss - PHV, Jeffrey J. Smith(PHV), SMITH DEVOSS, Hurst, TX.

For St. Paul Fire & Marine Insurance Company, Defendant: Charles Greg Copeland, Dale G. Russell, Rhonda Lea McCullough, COPELAND, COOK, TAYLOR & BUSH, Ridgeland, MS. Michael Keeley(PHV), Toni Scott Reed - PHV, STRASBURGER & PRICE, LLP, Dallas, TX.

For Vollie Neal Walker, Defendant: Charles Greg Copeland, Rhonda Lea McCullough, COPELAND, COOK, TAYLOR & BUSH, Ridgeland, MS.

JUDGES: HENRY T. WINGATE, CHIEF UNITED STATES DISTRICT JUDGE.

MEMORANDUM OPINION AND ORDER

Before the court are the cross-motions of the parties for summary judgment brought pursuant to Rules 56(a) [1] and (b) [2] of the Federal Rules of Civil Procedure. Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part that, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Each party herein contends it is entitled to a judgment on the papers and without benefit of trial.

This court's subject matter jurisdiction is predicated on diversity of citizenship as provided by Title 28 U.S.C. § 1332. [3] In a diversity action, this court is bound to apply the same law that a state court of the forum would apply. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). The forum state in this case is Mississippi. In obedience to the *Erie* Doctrine, this court must deduce Mississippi's ultimate position on the issue now presented to this court from the current body of Mississippi law on insurance policy language, applicable Fifth Circuit opinions, if any, decisional law of other states and decisional law from other federal courts. *See Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 848 (5th Cir. 1969).

BACKGROUND

The plaintiff Madison Materials Company, Inc. ("Madison Materials") filed the instant lawsuit claiming breach of an insurance contract and bad faith failure to

pay benefits. Madison Materials disagrees with the interpretation of the policy language by its insurer, the defendant St. Paul Fire and Marine Insurance Company ("St. Paul"), and brings this lawsuit to recover the difference between the $ 350,000.00 already tendered by St. Paul and the $ 1,469,148.53 total amount that was embezzled by one Vollie Neal Walker between 1992 and 2002. The parties agree that Vollie Neal Walker, an employee of Madison Materials, embezzled $ 1,469,148.53 from Madison Materials in every year between 1992 and 2002. The parties also agree that during each year Walker was embezzling from the company, Madison Materials was covered for "losses due to crime" under Policy No. 406 CF 1400, and that Madison Materials did not discover Walker's illegal activities until January of 2003, shortly after Walker's embezzlement activities ceased in 2002.

Madison Materials says it gave St. Paul notice of its losses incurred as the result of Walker's embezzlement on February 7, 2003, soon after this activity was discovered in January of 2003. St. Paul acknowledges receipt of this notice and says it conducted its own separate investigation of the matter and a separate audit. Consequently, St. Paul says it confirmed Walker's embezzlement activity between 1992 and 2002. St. Paul, though, has tendered to Madison Materials cash benefits in the amount of $ 350,000.00 for the employee misconduct occurring between January 26, 2000, and January 26, 2003, on the theory that the only coverage period in effect is the one when the embezzlement in question was discovered.

Madison Materials strongly disagrees, contending that Policy No. 406 CF 1400 was renewed on an annual basis

and continued to cover losses due to employee dishonesty occurring in any year a policy had been in existence, so long as the dishonesty was discovered and reported to St. Paul within one year after all continuing coverage had ended. Madison Materials now claims bad faith failure to pay all benefits due, and seeks punitive damages. Madison Materials has filed for summary judgment on these claims. St. Paul also seeks summary judgment that it has paid all benefits provided under the terms of the policy.

For the reasons that follow, this court finds that the summary judgment motion submitted by St. Paul is well taken and should be granted.

THE ST. PAUL POLICY

During the period between 1991 and 2002, Madison Materials initially purchased and continually renewed Policy No. 406 CF 1400 which provided coverage for losses caused by employee dishonesty, defined by each policy as, "dishonest acts committed by an **Employee**, ... acting alone or in collusion with other persons ... with manifest intent to (1) Cause You to sustain loss; and also (2) Obtain financial benefit ... for (a) The **Employee**, or (b) any person or organization intended by the **Employee** to receive that benefit." See Employee Dishonesty Coverage Form D(3)(a). The coverage was renewed annually, paid for by annual premiums.

The most current version of Policy No. 406 CF 1400 in effect at the time Neal Walker's embezzlement was discovered in January of 2003, provided a coverage period extending from January 26, 2000, to January 26,

2003. [4] Subsection b. of the policy states that, "[s]ubject to the Loss Sustained During Prior Insurance Condition, *we will pay only for loss that you sustain through acts committed or events occurring during the Policy Period* (emphasis added)." St. Paul maintains that this language refers only to losses occurring during the coverage period from January 26, 2000, to January 26, 2003. Coverage will be provided, says St. Paul, so long as the loss or losses are discovered and reported within one year after the end of coverage. [5]

Policy No. 406 CF 1400 also provides under the heading "Loss Sustained During Prior Insurance" that, "a. If you ... sustained loss during the period of any prior insurance that you ... could have recovered under that insurance except that the time within which to discover loss had expired, we will pay for it under this insurance, provided: (1)This insurance became effective at the time of cancellation or termination of the prior insurance; and (2) The loss would have been covered by this insurance if it had been in effect when the acts or events causing the loss were committed or occurred." Policy No. 406 CF 1400 defines the term "occurrence" as, "... *an act or series of related acts* involving one or more "**Employees**" (emphasis added). *See* Employee Dishonesty Coverage Form, D(3)(b). This language, says St. Paul, means that Neal Walker's acts of embezzlement were a series of related acts which constituted one, and only one, occurrence.

According to St. Paul, Policy No. 406 CF 1400 bearing the coverage period from January 26, 2000, to January 26, 2003, was the only policy in effect when the embezzlement in question was discovered. Each coverage period, says St. Paul, was for three years, and

not year to year as claimed by Madison Materials. So, says St. Paul, each time Policy No. 406 CF 1400 was renewed began a new three-year coverage period, even though premiums were paid in three separate installments over each three-year coverage period.

Madison Materials contends that all acts of embezzlement by Walker from 1992 to 1999 should be covered because they were discovered before the end of the last policy in force, and because the employee dishonesty coverage has been in effect each year that an embezzlement has occurred.

Thus, the parties differ sharply over Policy No. 406 CF 1400's period of coverage. In the midst of this dispute is the parties' disagreement over the meaning of the term "occurrence" in the policy language and how the present definition affects St. Paul's liability.

THE SUMMARY JUDGMENT STANDARD

As noted previously, a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c) of the Federal Rules of Civil Procedure. On a motion for summary judgment, a movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). In the instant case, both parties have filed opposing motions for summary judgment and they agree that there is no genuine issue of material fact. According to Madison

Materials and St. Paul, either one party or the other is entitled to judgment as a matter of law.

Madison Materials contends that St. Paul's policy of insurance is ambiguous in several respects. Ordinarily, where a contract is ambiguous, summary judgment is improper since the intent of the parties would be a genuine issue of material fact. *Freeman v. Continental Gin Company*, 381 F.2d 459, 463 (5th Cir. 1967). The preliminary issue of whether there is ambiguity is a question of law, not of fact, and is for the court to decide. *Id.*

So, pursuant to Rule 56(c) of the federal Rules of Civil Procedure, this court will enter summary judgment against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

APPLICABLE LAW

The construction and effect of an insurance policy are matters of law to be decided by the court." *Jones v. Southern Marine & Aviation Underwriters, Inc.*, 888 F.2d 358, 360 (5th Cir. 1989) (citations omitted). Inasmuch as this case is before the court based on diversity of citizenship, this court must employ the substantive law of the State of Mississippi to determine the outcome of this dispute. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Sentry Insurance v. R.J. Weber Company*, 2 F.3d 554, 556 (5th Cir. 1993).

Under Mississippi law, a contract of insurance, like any other contract, must be interpreted according to its terms. *Foreman v. Continental Casualty Company*, 770 F.2d 487, 489 (5th Cir. 1985). The interpretation of an insurance policy is a question of law for the court when the meaning of the terms is clear and unambiguous. *Aero International, Inc. v. United States Fire Insurance Company*, 713 F.2d 1106, 1109 (5th Cir. 1983). "No rule of construction requires or permits the court to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligations where the provisions of its policy are clear.'" *Id.* at 489.

THE MATTER OF AMBIGUITY

Under Mississippi law, the interpretation of an insurance policy is a question of law, not one of fact." *Noxubee County School District v. United National Insurance Company*, 883 So.2d 1159, 1165 (Miss. 2004). Mississippi insurance law is quite clear that "when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written. *Noxubee County*, 883 So.2d at 1165, citing *Paul Revere Life Insurance Company v. Prince*, 375 So.2d 417, 418 (Miss. 1979). "Any ambiguities in an insurance contract must be construed against the insurer and in favor of the insured and a finding of coverage." *Nationwide Mutual Insurance Company v. Garriga*, 636 So.2d 658, 662 (Miss. 1994). "Further, provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer." *Noxubee County*, at 1165.

ANALYSIS

A. The *BUDDY JONES* Decision

Madison Materials argues that eleven policies are triggered and provide separate limits of $ 350,000.00 for each year of Walker's illegal conduct taking place between 1992 and 2002. In support of this contention Madison Materials submits the case of *Universal Underwriters Insurance Company v. Buddy Jones Ford*, 734 So.2d 173 (Miss. 1999), where a bookkeeper and office manager of Buddy Jones Ford Lincoln-Mercury, Inc., misappropriated funds on 175 separate occasions from 1984 through 1988, resulting in a total loss to the dealership of $ 233,082.97. The embezzlement was discovered on or about July 25, 1988, during an unannounced independent audit.

Universal Underwriters Insurance Company had issued to Buddy Jones Ford Lincoln-Mercury, Inc., a series of garage liability policies of insurance for the policy period October 1, 1984, to October 1, 1985; from October 1, 1985, to October 1, 1986; from October 1, 1986, to October 1, 1987; from October 1, 1987, to October 1, 1988; and from October 1, 1988, to October 1, 1989. The policies contained identical language relating to coverage for employee dishonesty. The insuring agreement provided in pertinent part as follows:

> INSURING AGREEMENT - WE will pay for LOSS as defined as follows:
>
> EMPLOYEE DISHONESTY - WE will pay for LOSS of MONEY, SECURITIES, and other property which YOU sustain resulting directly

from any fraudulent or dishonest act committed by an EMPLOYEE with manifest intent to:

(a) cause YOU to sustain such a LOSS, and;

(b) obtain financial benefit for the EMPLOYEE, or any other person or organization intended by the EMPLOYEE to receive such benefit other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions, and other EMPLOYEE benefits earned in the normal course of employment.

* * *

9. THE MOST WE WILL PAY - LOSS payment will not reduce OUR liability for other LOSSES. From the amount of LOSS, WE will deduct the net amount of all recoveries obtained or made by YOU (other than LOSS covered by any other bond or insurance) or US. If the net LOSS is in excess of the deductible stated in the declarations, and regardless of the number of persons or organizations included in YOU, the most WE will pay:

(a) under EMPLOYEE DISHONESTY, is the limit stated in the declarations as applicable to a LOSS caused by one or more EMPLOYEES, or to all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated;

* * *

> Regardless of the number of years this Coverage Part continues in force, the limit stated in the declarations is not cumulative from one period to another, or from one year to another.
>
> * * *

The discovery clause of the insuring agreement provided as follows: "LOSS is covered only if discovered not later than one year from the end of the Coverage Part period."

The Mississippi Supreme Court in *Buddy Jones Ford* concluded that all these provisions supported the plaintiff's contention that all policies in effect between 1984 and 1988 were triggered by 175 separate occurrences of employee dishonesty committed during this time period. "The words of limitation," said the Court, "... are strictly construed against the insurer, where they are of uncertain import or reasonably susceptible of a double construction," citing *Home Ins. Co. v. Thunderbird, Inc.*, 338 So.2d 391, 394 (Miss.1976) (quoting 1 Couch on Insurance 2d § 15:92 (1959)); and *Home Owners Ins. Co. v. Keith's Breeder Farms, Inc.*, 227 So.2d 293, 295 (Miss.1969) ("any ambiguity in the language of the policy will be construed more strictly against the writer of the policy"). Madison Materials contends that this finding is dispositive of the issue in the instant case. Certainly, the similarity between the language of the instant policy and the Universal Underwriters policy in *Buddy Jones Ford* is obvious, but the story does not stop here.

Finding no Mississippi case law on point, the *Buddy Jones Ford* Court justified its conclusion by referring to

cases in other jurisdictions. The Court particularly noted that, "the cases in which courts have considered the question of whether stated policy limits and deductibles for employee dishonesty coverage apply *to a series of acts* caused by an employee, are those cases in which the policy language clearly and unambiguously states that multiple acts may constitute one occurrence of loss." *Universal Underwriters v. Buddy Jones Ford*, 734 So.2d at 177. *See American Commerce Insurance Brokers, Inc. v. Minnesota Mutual Fire & Casualty Company*, 551 N.W.2d 224, 225 (Minn. 1996), where the policy stated specifically that all loss or damage involving a single act or series of related acts was considered one occurrence; *Business Interiors, Inc. v. Aetna Casualty & Surety Company*, 751 F.2d 361 (10th Cir. 1984), where the dishonest employee had forged forty checks and the district court found that the insured had suffered only one loss. The Mississippi Supreme Court concluded that, "a factual issue of whether multiple acts are sufficiently related to constitute one occurrence of loss only arises where the applicable policy language unambiguously states that multiple acts may be so treated." *Universal Underwriters*, at 177. *See also Jefferson Parish Clerk of Court Health Insurance Trust Fund v. Fidelity & Deposit Company of Maryland*, 673 So.2d 1238, 1245 (La.Ct.App. 1996), where occurrence was defined as "all loss caused by, or involving, one or more employees, whether the result of a single act or a series of acts;" the court held that only one occurrence of employee dishonesty could be found in the employee's series of dishonest actions.

Finding no language in Universal Underwriters' policy stating that multiple acts or a series of related acts may

be treated as one occurrence of loss, the Mississippi Supreme Court agreed with the plaintiff that the policy limits of each policy in effect between 1984 and 1988 applied to each one of the 175 incidents of employee dishonesty. Each incident constituted an occurrence.

Now, Madison Materials contends that the decision in *Buddy Jones Ford* controls the outcome of the instant case. Certainly, the insuring agreement language in the Universal Underwriters policy is very similar to the language of St. Paul's policy in the instant case. However, as noted by St. Paul, the definition of "occurrence" in its policy is not the same.

B. "Occurrence" and the *"act or series of related acts"* Language

The interpretation of the word "occurrence" as used in any insurance contract is a question of law. *See Rutgers State University v. Martin Woodlands Gas Company*, 974 F.2d 659, 661 (5th Cir. 1992). St. Paul's policy states that, "[t]he most We will pay for loss in any one "occurrence," is the applicable Limit of Insurance shown in the DECLARATIONS. This limit is $ 350,000.00. See Employee Dishonesty Coverage Form, B.

Unlike the Universal Underwriters policy in *Buddy Jones Ford*, clearly worded language in St. Paul's policy states that multiple acts or a series of related acts may be treated as one occurrence of loss. As the Mississippi Supreme Court noted in *Buddy Jones Ford*, an occurrence is determined by the cause or causes of the resulting injury. *Id.* at 177. In the instant case, several causes can constitute one occurrence. In *Buddy Jones Ford*, unlike the instant case, Universal

Underwriters could show nothing to rebut the plaintiff's contention that the limitations clause unambiguously applied to each separate occasion of embezzlement. In the instant case, St. Paul can accomplish what Universal Underwriters could not because the instant policy contains language stating that multiple acts or a series of related acts may be treated as one occurrence of loss.

An ambiguity is created when a policy can logically be interpreted in more than one way, one of which would allow coverage. *Buddy Jones Ford*, 734 So.2d at 176. The instant policy cannot be interpreted in more than one way on the matter of what constitutes an occurrence; so, the policy is unambiguous on that point. While no Mississippi case directly addresses the definition of occurrence found in St. Paul's policy, this court finds persuasive authority in the decisions of cases such as *Bethany Christian Church v. Preferred Risk Mutual Insurance Company*, 942 F.Supp. 330, 335 (S.D. Tex. 1996) [6] where one employee's thefts of cash over the course of three separate policy renewal periods were held to constitute one occurrence so that the church could only recover the limit of the one policy in effect at the time the church discovered the theft. *Id.* at 335. The policies at issue there defined "occurrence" in the exact manner as the policy at issue in this case. This court also notes the case of *Diamond Transportation System v. Travelers Indemnity*, 817 F.Supp. 710, 712 (N.D. III. 1993), holding that a series of acts by an employee of the defendants between March, 1989, and March, 1993, were a single "occurrence" of theft. These cases are but two of the eight cases [7] cited by St. Paul in support of its argument on its definition of occurrence and the consequences of

that definition.

This court is persuaded that in light of the available authority, the definition of "occurrence" in St Paul's policy carries the day for St. Paul. Inasmuch as Neal Walkers' several acts of embezzlement constitute one occurrence, Madison Materials may recover only the limit of the one policy in effect at the time it discovered Walker's theft. *Bethany Christian Church*, at 335. The amount of this limit is $ 350,000.00, the amount already tendered by St. Paul.

C. The Execution or Renewal Report

Exhibit I to Madison Materials' motion for summary judgment is an Execution or Renewal Report pertaining to Policy No. 406 CF 1400's which shows that the premium period for the renewed policy is three years, with the premium divided into three equal installments of $ 815.00 each. The next line shows that the "Premium Period" extends from January 26, 2000, to January 26, 2003. Madison Materials submits that this reference to a "Premium Period" means that St. Paul only intended the "Premium Period" to extend for three years, not the policy coverage period. Madison Materials contends that the use of the phrase "Premium Period" in the Execution or Renewal Report creates an ambiguity as to the period of coverage, since the premium period, not the period of coverage, is contained on this page. This court is not persuaded.

This court has reviewed Exhibit I closely, and finds that the Execution or Renewal Report refers to a premium period for the renewed policy in question. This Execution or Renewal Report is attached to the

Commercial Crime Policy Declarations page, Form A, which states clearly that the policy's period of coverage is from January 26, 2000, to January 26, 2003. That the "Premium Period" of the Execution or Renewal Report and the period of coverage stated in the Declarations page should coincide is no surprise and offers no ascertainable basis for concluding that St. Paul's policy is ambiguous on the issue of whether the policy coverage period was for three years.

D. The Premium Statements and Two Invoices

Madison Materials submits three documents, a statement and two invoices, in support of the contention that any embezzlement taking place in any year of coverage between 1992 and 2002 would be covered by that year's policy up to one year after its coverage period expired; or, that by a subsequent renewal of the policy, the past illegal activity would be covered even if not discovered until several years later, so long as a renewed policy was in effect.

The first of these documents (Exhibit R) is a statement dated January 31, 2000, which reflects a premium balance due of $ 875.00, and a binder number of 117069. The statement also shows an onset date for coverage of losses relating to crime of January 26, 2000. The next document, Exhibit S, is an invoice referring specifically to Policy No. 406 CF 1400 and loss due to crime, showing receipt of an annual payment of $ 815.00 from Madison Materials for this coverage. The invoice states that the effective policy period is from January 26, 2001, until January 26, 2002. Exhibit T is an invoice similar to Exhibit S, showing the same annual installment of $ 815.00 and a period of coverage from January 26, 2002,

to January 26, 2003.

Significantly, these three documents are ordinary business documents of The Bottrell Agency, not part of any St. Paul insurance contract or any other St. Paul document. The Bottrell Agency was the party responsible for collecting premiums on behalf of the insurance companies it represented, including St. Paul, in accordance with what the respective policies required. This court is not persuaded that these documents can support a contention of ambiguity with regard to the coverage period provided by Policy No. 406 CF 1400 issued by St. Paul.

E. The "Stacking" Issue Raised by Madison Materials

Under Mississippi Law, the term "stacking" applies to uninsured motorist coverage. *See United States Fidelity and Guaranty Company v. Ferguson*, 698 So.2d 77, 79 (Miss. 1997) (public policy of this State mandates stacking of [uninsured motorist] coverage for every vehicle covered under a policy, regardless of the number or amount of the premium(s) paid for [uninsured motorist] coverage). Madison Materials submits that the various coverage periods under Policy No. 406 CF 1400 should accumulate from year to year or coverage period to coverage period. This argument is undermined by a non-accumulation of coverage provision contained under the "General Conditions" provisions of Policy No. 406 CF 1400. The language states that, "[w]e will pay only for covered loss discovered no later than one year from the end of the policy period," *and "[r]egardless of the number of years this insurance remains in force, or the number or*

premiums paid, no Limit of Insurance cumulates from year to year or period to period" (emphasis added). Pursuant to this language, policy benefits do not accumulate with the benefits provided by Policy No. 406 CF 1400 under either previous coverage periods or subsequent coverage periods.

CONCLUSION

Therefore, in accordance with the foregoing analysis, the motion of the defendant St. Paul Fire and Marine Insurance Company for summary judgment [Docket No. 52-1] is well taken and is hereby granted. The motion of Madison Materials for summary judgment [Docket No. 47-1] is denied. The court will enter a final judgment in accordance with the local rules.

SO ORDERED AND ADJUDGED this the 27th day of September, 2006.

s/ HENRY T. WINGATE

CHIEF UNITED STATES DISTRICT JUDGE

Footnote

[1]Rule 56(a) of the Federal Rules of Civil Procedure provides that, "[a] party seeking to recover upon a claim, counterclaim, cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof."

[2] Rule 56(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] party against whom a claim ... is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

[3] Title 28 U.S.C. § 1332 provides in pertinent part: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between-- (1) citizens of different States; ...

[4] The policy contains a paragraph denominated as the Crime General Provisions (Loss Sustained Form), B, General Conditions which provides that, "a. [t]he Policy Period is shown in the Declarations." The period shown there is from January 26, 2000, to January 26, 2003.

[5] Pursuant to the part of the policy denominated "Crime General Provisions (Loss Sustained Form), B, General Conditions" the policy provides an "Extended Period to Discover Loss" which states that, "[w]e will pay only for covered loss discovered no later than one year from the end of the policy period."

[6] In *Ran-Nan Inc. v. General Accident Insurance Company of America*, 252 F.3d 738, 740 (5th Cir. 2001), the Fifth Circuit distinguished *Bethany Christian Church*, noting that, as in the instant case, it involved a series of thefts by a single employee, whereas the *Ran-Nan* dispute involved independent pilfering schemes by two different employees working separately. The Fifth Circuit rejected the insurer's "one" occurrence

argument, stating that, "[t]o accept General Accident's proffered definition of 'occurrence' this court would have to find that the independent nature of these two series of thefts is irrelevant and that one loss with two unrelated causes is one "occurrence." The more natural reading of the policy, however, is that the 'involving' clause signifies that a group of employees conspiring together to steal is a single "occurrence." The facts of *Ran-Nan* are not present in the instant case and its analysis is not applicable here.

[7] *See also Wausau Business Ins. Co. v. U.S. Motels Management, Inc.*, 341 F.Supp.2d 1180 (D.Colo. 2004), quoting the Tenth Circuit and the Third Circuit, and tasked with determining whether a series of acts of embezzlement were one occurrence or multiple occurrences, stated that the determinative "question is not whether the employee's various methods of embezzling were related ... but whether the cause of the loss was related." *Id.* at 1183-84. The *Wausau Business* court determined that "[t]he cause of defendant's loss was the dishonesty of one employee" and, therefore, constituted one occurrence. *Id. Glaser v. Hartford Casualty Insurance Company*, 364 F. Supp.2d 529, 537 (D. Md. 2005 (same).

Filed 5/15/2008
No. 06-60991
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MADISON MATERIALS COMPANY INC,
Plaintiff - Appellant

v.

ST PAUL FIRE & MARINE INSURANCE COMPANY,
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson.

ON PETITION FOR REHEARING

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.